Bert McLachlan
3524 West 97th Place
Leawood, Kansas 66206
1-800-213-4181 bertmclachlan@msn.com

January 7, 2002

Department of Justice

Re: Microsoft Settlement

Fax: 1-202-307-1454 (Four pages total)

Beyond a doubt, it is time to settle the Microsoft case and get it *over with,* not letting it be dragged on and on just because of a few obstinate state attorneys general. Don't let the tail (the state AGs) wag "the dog"(this case). As one lawyer said, "the issues in this case have been beaten to death by people who are worn out." There *is* no case, so be done with it.

This was a political case from the beginning: Senator Orrin Hatch and his buddy, Joel Klein, helping Novell and other software companies (from Hatch's state) try to accomplish through the courts what they couldn't accomplish in the marketplace with their products. It is a case against one of the most customer-beneficial business successes ever. The case would never have been brought by a Bush Administration, and the Bush Administration does not want it pursued.

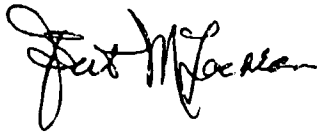
Neither does the worldwide public, which is the very happy beneficiary of everything that Microsoft has done for our lives and our economies. Judge Jackson made the case a ridiculous circus. It has cost people *billions* already.

Settle this misguided suit. Get it over with. Move on to something relevant.

The two accompanying fax pages, (1) a Wall Street Journal editorial of March 1, 2001, "The Microsoft Appeal", and (2) a September 7, 2001 article, "Justice Bows to Reason", both express my views on this. Particularly in the latter, please note that "the (D.C. Circuit's) opinion includes important admonitory language about the grave problems of pursuing antitrust claims in quickly evolving industries, such as software and other high-tech industries, which neither the prosecutors nor the courts know much about."

The market takes care of these things. Learn a little something from the federal government's decade or more of earlier similar misguided efforts with IBM.

A Consumer,



Bert McLachlan

THE WALL STREET JOURNAL THURSDAY, MARCH 1, 2001

The Microsoft Appeal

For a while you couldn't sit down with a Japanese or German or British CEO without them wanting to shake their heads over the spectacle of the U.S. government seeking to destroy one of America's most successful and important companies. The further you got from American political culture, the weirder the Microsoft lawsuit seemed.

Most of the local Washington press bought it, though, because Joel Klein was a shrewd judge of the reach of his permission slip to beat up the world's richest man. His hireling David Boies has gone on to represent Napster; Mr. Klein has joined Bertelsmann, the German media and music giant that struck a deal with Napster. And their Microsoft case this week basically collapsed.

Lawyers for both sides left the appeals court knowing there would be no breakup, and probably not much of a case once the appeals bench gets done throwing out everything that was unproved, counterfactual or lacking in coherence. The telling remark was Chief Judge Harry Edwards's comment about "sleights of hand" over whether Microsoft was accused of trying to create a browser monopoly (for a product it was giving away free?) or seeking to protect its Windows monopoly (how does making a better browser and distributing it free protect Windows?).

Let us confess some sympathy for Judge Jackson, who was knocked around by the appeals panel for his apparent bias as trial judge. With every action since the start he seemed to betray a reservation about whether the matter really belonged in court. Why this came to be projected into resentment of Microsoft and Bill Gates is a question for his memoirs. He called Mr. Gates "Napoleonic," which might be accurate if he meant someone who had achieved a great deal at a young age. And what a group of D.C. drug peddlers, the Newton Street Crew, did to merit comparison to Microsoft we'll never know. But Microsoft's real offense was clear: It declined to cop a plea so everyone could go home and brag about the big trophy for the rest of their lives. Instead, the company kept insisting it had done nothing wrong.

By the time he got around to offering the most drastic remedy imaginable for Microsoft's alleged wrongs, dismemberment of the company, Judge Jackson was hilariously agnostic on whether the end result would be good or bad, saying the question wasn't even worth taking testimony on; I'm outta here. Then he blabbed to the press. Surely these actions served their purpose: Whatever the appeals bench decides, *U.S. v. Microsoft* most likely won't be coming back to Judge Jackson's courtroom.

The puck now has been slapped to a new Administration. NYU economist Lawrence J. White, a former chief economist of Justice's antitrust division, proposed in a New York Times op-ed that the Bushies "save face" by letting Microsoft go with a $10 billion fine.

Huh? Mr. Bush has no need to save face. He didn't bring this misguided lawsuit. This was Clinton-era handiwork, a vestige of a weird time when the White House and senior Justice officials had unhealthy stakes in each other. Mr. Klein had been Mr. Clinton's deputy White House counsel. His boss, Janet Reno, didn't have much to look forward to beyond her job as Attorney General. Mr. Clinton was keen not to be investigated for campaign finance scandals. They found a modus vivendi, and Microsoft was collateral damage.

Events this week seal the case for withdrawing whatever is left of the original lawsuit when the appeals court gets done with it. The best way for the government to "save face" is to pronounce this sorry adventure a mistake to begin with.

Justice Bows to Reason

By George L. Priest

The Justice Department has decided to drop its further prosecution of Microsoft, and this will come as no surprise to those who examined with care the opinion of the U.S. Court of Appeals in June. After all, the D.C. Circuit's unanimous ruling provided a virtual road map to the lower court to find that Microsoft's tying of its browser to Windows was unobjectionable, and that a breakup of the company could not be justified.

So, put bluntly, the Justice Department yesterday dropped the tying claim, as well as the breakup remedy, because it faced a zero chance of success. Thus, what has been widely dubbed as the greatest antitrust case of the last 50 years ends with a whimper.

Antitrust Jurisprudence

Quoting the Supreme Court, the D.C. Circuit had stated that "it is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition." But in the next sentence, the appeals court added, "But there are strong reasons to doubt that the integration of additional software functionality into an OS [operating system] falls among those arrangements." Still later, the court instructed that "because of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered."

Thomas Penfield Jackson

The D.C. Circuit was equally clear about the inappropriateness of the breakup remedy. It cautioned the lower court that a breakup was generally an effective remedy only for monopolies that had been created by the merger of former competitors, and not for unitary companies like Microsoft. In addition, the court severely questioned whether there was any causal connection between Microsoft's exclusionary conduct and its monopoly market share, adding that "If the court on remand is unconvinced of the causal connection between Microsoft's exclusionary conduct and the company's position in the OS market, it may well conclude that divestiture is not an appropriate remedy."

There have been millions spent on prosecution and defense in the Microsoft case, and millions of hours of academic analysis, with a vast volume of litigation still in the wings. The claim of waste is hard to reject.

Where does this leave the case? In its press release yesterday, announcing that it was dropping the tying and breakup charges, the Justice Department stated that it would seek an order "modeled after the interim conduct-related provisions" of U.S. District Court Judge Thomas Penfield Jackson's Final Judgment. Some of these remedies, though less damaging than a breakup, were nonetheless draconian. Among other remedies, Judge Jackson would have required Microsoft to disclose portions of its source code, to provide price discounts to Original Equipment Manufacturers (or OEMs) according to how many of Windows' features they deleted, and to generally treat all vendors and customers equally, regardless of their actions.

But there is no basis in the Court of Appeals's opinion for conduct remedies of this nature, and the lower court is not likely to approve them. According to the Court of Appeals, the only justifiable conduct remedies are an injunction prohibiting Microsoft from entering various exclusive dealing contracts and compelling it to redesign Windows to allow a customer to delete the browser if there are any customers who would want such a thing. Remedies of this nature will not affect Microsoft's operations in any significant way, and, indeed, were largely accepted by Microsoft prior to trial.

The Justice Department also hinted that it wanted discovery to determine whether there are any violations associated with the forthcoming introduction of Windows XP. The statement was only a hint, but it may prove troublesome if either the Justice Department or any of the state attorneys general still in the case choose to take the matter seriously. According to the D.C. Circuit's analysis of tying, the full integration into Windows XP of features such as Media Player or Instant Messaging should be perfectly permissible. The court's opinion, however, contains one cryptic conclusion regarding "code commingling" that may make the outcome unclear. Though it may take some time, if the lower court carefully works through the D.C. Circuit's basic analysis, there are unlikely to be any serious obstacles to Windows XP.

Does this mean that the entire Microsoft prosecution was a waste? Surely, it has caused substantial harm. Many have pointed out that the collapse of the dot-com industry dated almost exactly from the release of Judge Jackson's "Findings of Fact," most of which have been vacated. Microsoft's decline in market capitalization was accelerated by Judge Jackson's "Conclusions of Law," most all of which have been vacated. There have been millions spent on prosecution and defense, and millions of hours of academic analysis, with a vast volume of litigation still in the wings. The claim of waste is hard to reject.

Important Analysis

But some rays of light have resulted. The D.C. Circuit's opinion, though unsupported and weakly defended on exclusive dealing, contains an important analysis of tying arrangements and bundling that substantially advances the law beyond the current jurisprudence of the Supreme Court. In addition, the opinion includes important admonitory language about the grave problems of pursuing antitrust claims in quickly evolving industries, such as software and other high-tech industries, which neither the prosecutors nor the courts know much about. The Justice Department's action yesterday acknowledges the truth and significance of these warnings.

Finally, the Court of Appeals opinion and the Justice Department's retreat should serve as a cautionary guide to actions against Microsoft threatened by the European Commission [illegible] as to the [illegible] state attorneys general who may [illegible] stubborn on [illegible] These are small benefits and are hardly worth the accumulated social cost [illegible] as wasteful [illegible] been. If still [illegible] prosecutors [illegible] not to bring such [illegible] in the future.

Mr. Priest teaches law and economics at Yale Law School and has served as a consultant for Microsoft.